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No. 78-546

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY HELSTOSKI, PETITIONER

v.

HONORABLE H. CURTIS MEANOR, UNITED STATES DISTRICT JUDGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 576 F. 2d 511. The opinions of the district court (Pet. App. 9a-22a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1978. Petitions for rehearing were denied on June 30, 1978. The petition for a writ of certiorari was filed on September 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201(c), is

invalid because it contains references to legislative acts that are not themselves punishable due to the Speech or Debate Clause.

2. Whether consideration by the grand jury of evidence showing legislative acts deprives the district court of jurisdiction to try an indictment alleging a violation of 18 U.S.C. 201(c).

3. Whether the district court's restriction of the government's proof at trial to prevent references to legislative acts constitutes a constructive amendment of the indictment.

STATEMENT

Petitioner Helstoski, a former member of Congress, was indicted in the United States District Court for the District of New Jersey on three substantive counts and one conspiracy count alleging violations of the official bribery statute, 18 U.S.C. 201(c). The indictment charged that petitioner had acted with others to solicit and receive bribes in return for being influenced in the performance of his official duties. Petitioner's motion to dismiss these counts was denied, and he then unsuccessfully petitioned the court of appeals for a writ of mandamus to prevent trial on the indictment (576 F. 2d 511, 515-520).[1]

The procedural and factual background of petitioner's indictment are set forth in our petition for certiorari (78-349 Pet. 3-9) and in the opinion of the court of appeals (78-349 Pet. App. 2a-9a). Briefly, the indictment charged petitioner with having solicited and received bribes in return for the introduction of private immigration bills on behalf of specified aliens residing illegally in the United States (*id.* at 2a-6a). Petitioner appeared before investigating grand juries on ten occasions and voluntarily testified about his introduction of the private immigration

[1]The opinion of the court of appeals is set forth in the Appendix to the United States' petition for a writ of certiorari in this case (78-349 Pet. App. 1a-33a).

bills; he also provided the grand juries with copies of the bills and related correspondence (*id.* at 5a). Petitioner subsequently challenged the indictment as violative of his rights under the Speech or Debate Clause. The district court denied his motion to dismiss the indictment, but it restricted the scope of the government's proof at trial to exclude all evidence of the past performance of a legislative act.[2]

In denying petitioner's mandamus petition, the court of appeals concluded that this Court's decision in *United States* v. *Brewster*, 408 U.S. 501 (1972), "compels the conclusion that the indictment in the case before us does not violate the Speech or Debate Clause" (78-349 Pet. App. 15a; see also *id.* at 12a-14a). The court below also rejected the claim that the restriction of the government's proof had the effect of amending the indictment, and it held that the grand jury's consideration of evidence referring to legislative acts did not deprive the district court of jurisdiction to try the indictment (*id.* at 15a-21a).

ARGUMENT

As in his mandamus petition in the court of appeals, petitioner here argues (Pet. 9-27) that the present indictment is barred by the Speech or Debate Clause. As we demonstrate hereinafter, that claim is insubstantial and review of it by this Court is unwarranted.

We emphasize at the outset the procedural posture of this petition. It seeks review by this Court of the discretionary denial by the court of appeals of the petition for mandamus, which petition challenged an interlocutory order of the trial court denying a motion to dismiss. Mandamus is traditionally limited, *inter alia*, to cases in which the petitioner shows that he has no other available remedy and that his right to relief is "clear and indisputable." *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976); *Will* v. *Calvert Fire Insurance*

[2]The scope of the evidence permitted by the Speech or Debate Clause is the subject of our petition for certiorari in No. 78-349.

Co., No. 77-693 (June 23, 1978), slip op. 6. Petitioner can make no such showing here for he may again present his claims to the court of appeals upon appeal from a final judgment of conviction—if in fact he is convicted.[3] Here, as in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26-27 (1943), the "objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear" should be raised on direct appeal because mandamus "may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute."

1. Petitioner contends (Pet. 9-19) that his indictment should be dismissed (a) because the Speech or Debate Clause vests Congress with exclusive jurisdiction over bribery charges relating to the legislative process, and (b) because the instant indictment goes beyond that approved by the Court in *United States* v. *Brewster*, 408 U.S. 501 (1972).

a. Petitioner's jurisdictional argument is fully answered by *Brewster*, which affirmed the power of the Executive to investigate and prosecute and the Judiciary to punish (pursuant to statute) bribery of members of Congress in cases such as this. As the Court pointed out, while the Speech or Debate Clause guarantees the functional independence of individual Congressmen, it does not "make members of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.[4]

b. Contrary to petitioner's assertion, the instant indictment does not differ materially from the indictment upheld in *Brewster*. The indictment in *Brewster* charged

[3]In contrast, there will be no way to review the evidentiary limitation placed on the government's proof by the courts below unless our petition in No. 78-349 is granted. Congress has authorized immediate review of such limitations under 18 U.S.C. 3731, as the court below recognized (78-349 Pet. App. 22a-25a).

[4]The effect of this contention, if sustained, would apparently be to make former members of Congress, such as petitioner, wholly immune from any sanction for criminal misconduct.

that the defendant had accepted a bribe "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." 408 U.S. at 503. Thus, the indictment charged the defendant with having accepted funds for the performance of specified past legislative acts. Although the indictment in the present case contains somewhat more detail (see Pet. App. 1a-6a), it too alleges the solicitation and receipt of money for such legislative acts. As in *Brewster*, the mere reference to past legislative acts does not serve to bar trial of the indictment. This Court's reasoning in *Brewster*—that any improper allegation of legislative acts was mere surplusage and not a material element of the indictment—was correctly applied by the court below (see 408 U.S. at 527):

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

As *Brewster* emphasizes, the material elements of a Section 201(c) offense do not require direct proof of the Congressman's legislative performance (*id.* at 526). Thus, the court below correctly concluded that because the instant indictment "charge[s] a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause, [petitioner] has not made sufficient showing to justify issuance of the writ he seeks on Speech or Debate grounds" (78-349 Pet. App. 15a).

2. Petitioner further argues (Pet. 19-22) that even though he voluntarily testified before the grand jury and

produced documents without raising a Speech or Debate Clause objection, it was improper for the grand jury to "question a legislator" or consider evidence referring to his legislative acts. He does not contest in this connection the conclusion of both courts below that the indictment charges an offense under 18 U.S.C. 201(c); rather, he contends that consideration by the grand jury of evidence showing legislative acts deprives the district court of jurisdiction to try the indictment.

It is well settled, however, that an indictment that charges an offense and is returned by a legally constituted grand jury "is enough to call for a trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956); see also *United States* v. *Calandra*, 414 U.S. 338 (1974). This principle, intended to prevent protracted litigation over the competence of evidence reviewed by the grand jury, applies fully to claims based on the Speech or Debate Clause. In *United States* v. *Johnson*, 383 U.S. 169 (1966), this Court permitted retrial even though it was clear from the specification of a legislative act in the indictment that the grand jury had heard evidence referring to the legislative act. On appeal after retrial, the court of appeals rejected the argument that the indictment was invalid because of the presentation of evidence of legislative acts to the grand jury. *United States* v. *Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969). This Court subsequently denied the Congressman's petition for certiorari. 397 U.S. 1010 (1970). The instant petition for certiorari cites no authority that would support a contrary disposition of this claim here.

3. Petitioner further contends (Pet. 22-27) that the restriction by the courts below of the government's evidence had the effect of amending the indictment, contrary to *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Ex parte Bain*, 121 U.S. 1 (1887). While we maintain that the restriction of the government's evidence was improper, petitioner's claim of constructive amendment is groundless in any event.

The decision below did not alter the indictment returned by the grand jury; it merely limited the government's proof and treated certain statements in the indictment as surplusage. Neither *Bain* nor *Stirone* prevents federal courts from disregarding or striking surplusage in an indictment. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Watson* v. *Jago*, 558 F. 2d 330, 333 (6th Cir. 1977); *United States* v. *Hall*, 536 F. 2d 313, 319 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Dawson*, 516 F. 2d 796, 801 (9th Cir.), cert. denied, 423 U.S. 855 (1975).

The critical question is whether the essential elements of the crime charged in the indictment are the same elements to be proved by the government at trial. *United States* v. *Somers*, 496 F. 2d 723, 744 (3d Cir.), cert. denied, 419 U.S. 832 (1974); *United States* v. *Silverman*, 430 F. 2d 106, 111 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). That requirement is satisfied here. The decision below merely confines the government to proof of the material allegations charged in the indictment returned by the grand jury. Even assuming that the government should not be permitted to present evidence referring to past legislative acts, the unnecessary allegation of such acts in the indictment is properly disregarded as surplusage, as *United States* v. *Brewster, supra*, 408 U.S. at 527, squarely holds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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